

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR WILLIAMS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53771

FILED

OCT 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

On August 9, 1985, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court affirmed appellant's judgment of conviction on appeal. Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987). The remittitur issued on April 21, 1987.

Appellant unsuccessfully sought relief from his conviction by way of a petition for post-conviction relief and four post-conviction petitions for a writ of habeas corpus. Williams v. State, Docket No. 19470 (Order Dismissing Appeal, June 29, 1989); Williams v. State, Docket No. 34857 (Order of Affirmance, December 11, 2000); Williams v. State, Docket No. 39244 (Order of Affirmance, December 4, 2002); Williams v. State, Docket No. 40403 (Order of Affirmance, August 20, 2003); Williams v. State, Docket No. 51721 (Order of Affirmance, January 8, 2009).

On February 19, 2009, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that the petition was untimely and successive. Moreover, the State specifically pleaded laches. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On June 5, 2009, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that jury instructions 7 and 8, relating to the elements of murder, were flawed. Appellant claimed that he received a flawed jury instruction on the elements of first-degree murder because he was given the Kazalyn¹ instruction on premeditation. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (19 92), receded from by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 714 (2000).

¹In Kazalyn, this court approved the following instruction on premeditation:

Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. If the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate, and premeditated murder.

Kazalyn, 108 Nev. at 75, 825 P.2d at 583.

Appellant filed his petition more than twenty-two years after this court issued the remittitur from his direct appeal.² Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive. See NRS 34.810(1)(b)(2). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

In an attempt to excuse his procedural defects, appellant claimed: (1) the State created the delay because the district court gave the flawed jury instructions; and (2) a recent decision, Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008), provided good cause because this court and the federal courts had previously erroneously denied this claim.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying the petition as procedurally barred and without good cause. Appellant's claim relating to the State causing the delay is without merit as the providing of jury instructions does not amount to an impediment external to the defense. Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Appellant's reliance upon the Chambers decision was misplaced as Chambers did not announce any new proposition, but rather discussed and applied decisions entered previously. Specifically, the Chambers court discussed and applied the decision in Polk v. Sandoval, 503 F.3d 903, 911 (9th Cir. 2007), which itself discussed this court's

²Further, the petition was filed more than sixteen years after the effective date of NRS 34.726.

decision in 2000 in Byford. Because it is the substantive holdings of Polk and Byford that appellant sought to apply in this case, it is those cases that provide the marker for filing timely claims and not a later case, Chambers, merely discussing and applying those cases. Appellant's 2009 petition was filed more than eighteen months after entry of Polk and approximately nine years after this court's decision in Byford. Under these circumstances, appellant failed to demonstrate good cause for the entire length of his delay.

Even assuming that the decision in Chambers did provide good cause in this case, appellant failed to demonstrate actual prejudice. See Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (concluding actual prejudice requires that any errors worked to appellant's actual and substantial disadvantage which affected the proceedings with error of constitutional dimensions). In Byford, this court disapproved of the Kazalyn instruction on the mens rea required for a first-degree murder conviction, and provided the district courts with new instructions to use in the future. Byford, 116 Nev. at 233-37, 994 P.2d at 712-15. Several months later, this court determined that giving the Kazalyn instruction "was [not] error [nor did it violate] any constitutional rights" and that "with convictions predating Byford, neither the use of the Kazalyn instruction nor the failure to give instructions equivalent to those set forth in Byford provides grounds for relief." Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). Contrary to our holding in Garner, the Ninth Circuit in Polk held that Byford applied retroactively because giving the Kazalyn instruction constituted constitutional error. Polk, 503 F.3d at 911. Byford only affected

convictions that were not final at the time that Byford was decided as a matter of due process. See Garner, 116 Nev. at 788, 6 P.3d at 1025; see also Nika v. State, 124 Nev. ___, ___, 198 P.3d 839, 848 (2008). In Nika, this court rejected Polk's determination that the Byford instruction was constitutional error. Nika, 124 Nev. at ___, 198 P.3d at 849. Instead, this court reaffirmed its holding in Garner that Byford announced a change in state law rather than clarified existing state law. Id. When state law is changed, rather than clarified, the change only applies prospectively and to cases that were not final at the time of the change. Id. at ___, 198 P.3d at 850. Because appellant's conviction was final long before Byford was decided, the use of the Kazalyn instruction was not error in this case. Therefore, the district court did not err in denying appellant's petition as procedurally time barred and successive.

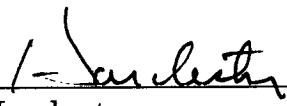
Appellant further failed to overcome the presumption of laches. The fact that trial transcripts are still contained in the record does not overcome the severe prejudice to the State in conducting a new trial for an offense that occurred in 1982.

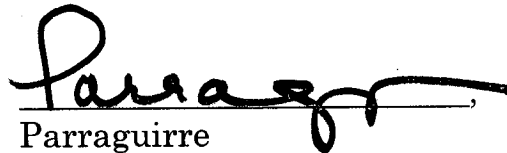
Finally, to the extent that appellant claimed that he was actually innocent because of the flawed jury instructions, and that this overcame the previously discussed procedural defects, appellant's claim fell short of demonstrating actual innocence because it is a claim of legal innocence, not factual innocence, and appellant did not show that it is more likely than not that no reasonable juror would have convicted him in light of new evidence. Calderon v. Thompson, 523 U.S. 538, 559 (1998); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Therefore,


we affirm the order of the district court denying the petition as procedurally barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, C.J.
Hardesty

 _____, J.
Parraguirre

 _____, J.
Pickering

cc: Hon. Elissa F. Cadish, District Judge
Oscar Williams Jr.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk